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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976
No.

COLORADO SPRINGS AMUSEMENTS, LTD., *trading as* Velvet Touch, and Laurel Bezner, Jacqueline Bell, Geraldine Stevens, Sandra C. Rowland, *et al.*, *Petitioners*

v.

Mayor Frank L. Rizzo, Police Commissioner Joseph F. O'Neill, Police Officers Powell, De Vecchio, and De Loach, *et al.*, *Respondents*

AND

Max Rubenstein, *trading as* Philadelphia Health Club, and Nicole Jones, Delores Rementer, Jeana Nicholson, Lenore Spence, *Petitioners*

v.

Mayor Frank Rizzo of the City of Philadelphia, F. Emmett Fitzpatrick, District Attorney of the City of Philadelphia, *et al.*, *Respondents*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 387 F. Supp. 690 (1974) (App. B, 13a-32a). The opinion of the United States Court of Appeals for the Third Circuit reversing the District Court is reported at 524 F.2d 571 (1975). (App. A, 1a-12a).

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether an inferior federal court is free to disregard three dismissals by this Court, for want of a substantial federal question, of challenges to ordinances identical in all material respects to the one in question here?

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COUNTER-STATEMENT OF THE CASE

On April 11, 1974, plaintiffs, Colorado Springs Amusements, LTD, trading as Velvet Touch and Laurel Benzer, *et al.*, employees of the Velvet Touch, filed a complaint (Civil Action No. 74-955) in the United States District Court for the Eastern District of Pennsylvania requesting injunctive and declaratory relief against the Mayor of the City of Philadelphia, the Police Commissioner, the Departments of Health and Licenses and Inspections and several police officers to enjoin them from enforcing a provision of the Philadelphia Code forbidding massaging members of the opposite sex.

Plaintiffs charged that a portion of Philadelphia Ordinance Bill No. 2524 (November 1, 1963), Philadelphia Code 9-610 (4) which regulated massage businesses, was unconstitutional on its face as applied to the plaintiffs.

The challenged portion of the massage business ordinance provides:

> Section 1. Chapter 9 of the Philadelphia Code relating to regulation of businesses, trades and protessions is amended as follows:
>
> §9-610 Massage Businesses . . .
> (4) Prohibited Conduct. No person employed or engaged in the business of a masseur or masseuse shall treat a person of the opposite sex.[1]

Later, on August 21, 1974, plaintiffs Max Rubenstein, trading as Philadelphia Health Club and Nicole Jones, *et al.*, employees of the Club also filed a complaint (Civil Action No. 74-2174) in the United States District Court for the Eastern District of Pennsylvania seeking injunctive and declaratory relief against the continued enforcement of Section 9-610(4) of the Massage Businesses Ordinance.

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1. The entire Massage Businesses Ordinance is set forth in Petitioners' Appendix "C" (33a-38a).

Pursuant to Local Rule 3(c)(3), the cases above were consolidated as related. Counsel for plaintiffs and defendants agreed to file cross motions for summary judgment in order to accelerate a judicial determination of the validity of the Massage Businesses Ordinance.

Upon the consideration of plaintiffs' motion, the District Court, by Judge Van Artsdalen, decided that Philadelphia Code 9-610(4) violated Section 1, Article 14 of the United States Constitution and declared the Ordinance void and unenforceable on its fact as to the quoted portion (Subsection 4) of the Ordinance (App. B, 13-32a).

On December 5, 1974, the District Court entered judgment for plaintiffs on the basis of their motions. From that final order, the defendants filed an appeal to the United States Court of Appeals for the Third Circuit on December 26, 1974.

The Court of Appeals *reversed*, ruling that the District Court was not free to disregard three dismissals by this Court, for want of a substantial federal question, of challenges to ordinances identical in all material respects to Philadelphia Code 9-610(4),[2] citing *Hicks v. Miranda*, — U.S. —, 45 L. Ed. 2d 223 (1975). (App. A. 1a-12a).

It is from the Court of Appeals' ruling on October 16, 1975, that petitioners now seek review.

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2. *Smith v. Keator*, 285 N.C. 530, 206 S.E. 2d 203 (1974), *appeal dismissed for want of a substantial federal question*, 419 U.S. 1043 (1975). *Rubenstein v. Cherry Hill*, unreported affirmance N.J. Sup Ct., January 29, 1974, *appeal dismissed for want of a substantial federal question*, 417 U.S. 963 (1974); *Kisley v. City of Falls Church*, 212 Va. 613, 187 S.E. 2d 168 (1972), *appeal dismissed for want of a substantial federal question*, 409 U.S. 907 (1972).

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REASONS FOR DENYING THE PETITION

Inferior Federal Courts Are Not Free to Disregard Three Dismissals by this Court, for Want of a Substantial Federal Question, of Challenges to Ordinances Identical in all Material Respects to the One in Question Here.

The question presented in the Petition is not new to this Court. The issue decided by the District Court in this case was whether a provision of the Philadelphia Code regulating massage businesses violated on its face any constitutionally protected right of the plaintiffs.

Although a substantial number of state court decisions uphold the facial constitutionality of similar local ordinances forbidding massaging persons of the opposite sex as a permissible exercise of the state's police power,[3] the District Court herein chose to ignore them, despite the fact that in several instances this Court had dismissed appeals attacking the validity of such ordinances.[4]

Instead, the District Court relied heavily on three suspect federal decisions to support the conclusion that the City of Philadelphia's massage ordinance was unconstitutional on its face. *Cianciolo v. City Council, Knoxville, Tennessee*, 376 F. Supp. 719 (E.D. Tenn. 1974); *Valley*

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3. *Smith v. Keator, supra; Rubenstein v. Cherry Hill, supra; Kisley v. City of Falls Church, supra; Patterson v. City of Dallas*. 355 S.W. 2d 838 (Tex. Civ. App. 1962), *appeal dismissed for want of a substantial federal question*, 372 U.S. 251 (1963); *Gregg v. State*, 376 S.W. 2d 763 (Tex Crim. 1964); *Ex parte Maki*, 52 Cal. App. 635, 133 P.2d 64 (1943).

4. *Smith v. Keator, supra; Rubenstein v. Cherry Hill, supra; Kisley v. City of Falls Church, supra.* See also, *Patterson v. City of Dallas, supra*, where, although not discussed by Judge Adams in his lucid comparison of three dismissals by this Court of challenges to ordinances identical to the one in question here (App. A, 9a-10a), this Court dismissed an appeal challenging a City of Dallas ordinance prohibiting a member of one sex from administering a massage to a person of the opposite sex.

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Health Systems, Inc. v. City of Racine, 369 F. Supp. 97 (E.D. Wisc. 1973); *Corey v. City of Dallas*, 352 F. Supp. 977 (N. D. Tex. 1972) (App. B, 21a-24a). However, only the *Cianciolo* case unequivocably held an ordinance similar to Philadelphia's as unconstitutional and violative of Title VII of the 1964 Civil Rights Act.[5]

The District Court erroneously bolstered its decision by additionally relying on *Corey, supra*, since the United States Court of Appeals for the Fifth Circuit reversed the District Court's decision therein when they held that an employer lacked standing to assert the equal protection rights of his female masseuses.[6] 492 F.2d 496 (1974). Likewise, the District Court in *Valley Health System, Inc., supra*, relied on the District Court's opinion in *Corey* prior to the Court of Appeals reversal.

Therefore, the District Court herein, although unaware of the importance attached to this Court's dismissal of four appeals of challenges to ordinances similar to City of Philadelphia's, compounded its error by assuming that the federal decisions in *Cianciolo, Corey* and *Valley Health Systems, Inc., supra* were good legal precedent.

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5. It is interesting to note that while the United States District Court for the Eastern District of Tennessee in *Cianciolo supra*, declared Knoxville's massage ordinance unconstitutional, the United States District Court for the Western District of Tennessee dismissed a challenge to the validity of a Memphis ordinance which made it unlawful for a massagist to treat a person of the opposite sex. *Garaci v. City of Memphis*, 379 F. Supp. 1393 (1974). Moreover, the *Garaci* Court had serious doubts concerning the applicability of 1964 Civil Rights Act (42 U.S.C. 2000e-2) to the massage ordinance. 379 F Supp. 1399. See, also, Judge Adam's opinion (App. A, 11a).

6. Judge Clark in *Corey, supra*, would have upheld the validity of the ordinance and reversed on the merits. 492 F.2d 498 (concurring opinion). Furthermore, the Corey Court did not examine the import of this Court's decision in *Patterson v. City of Dallas, supra*.

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As Judge Adams noted in his opinion in the instant case (App. A, 10a), three[7] dismissals by this Court of Appeals, for want of a substantial federal question, of appeals where similar municipal ordinances were attacked, are precedent for the respondents' position. Without repeating Judge Adam's analysis (App. A, 9a-12a), it is fair to say that petitioners fail to raise any substantial argument in support of their position that this Court has not already examined and decided in favor of the respondents.

While petitioners would like to ignore this Court's recent decision in *Hicks v. Miranda, supra,* there can be no doubt that inferior federal courts are bound herein by this Court's pronouncements in *Keator, supra; Rubenstein, supra; Kisley, supra* and *Patterson, supra.* As this Court stated in *Hicks:*

> . . . [V]otes to affirm summarily and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case. 45 L.Ed. 2d 236.[8]

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7. Respondents would additionally argue that the Court's dismissal of the appeal in *Patterson v. City of Dallas, supra,* is also dispositive on the merits of the Petition herein.

8. This Court's decision in *Hicks v. Miranda, supra,* was not reported before respondents filed their brief in the Court of Appeals, but this writer did cite the case in oral argument (App. A, 5a). However, the respondents did argue in their brief the case of *Edelman v. Jordan,* 415 U.S. 651 (1974), where this Court remarked that . . . summary affirmances obviously, are of precedential value . . . 415 U.S., at 671 to support the Respondents' position that this Court's dismissals of the appeals in *Keator, Kisley, Rubenstein* and *Patterson* were dispositive on the merits of the petitioners' case. In addition, respondents argued that this Court's view of the precedential value of summary affirmances (and dismissals) was held by numerous Courts of Appeals prior to the *Hicks* decision. See *Ahern v. Murphy,* 457 F.2d 363 (7th Cir. 1972); *Joseph v. Blair,* 482 F.2d 575 (4th Cir. 1973); *Doe v. Hodgson,* 478 F.2d 537 (1973), *cert. den.,* 414 U.S. 1096 (1971) (cited with approval by this Court in *Hicks, supra,* 45 L.Ed. 2d 236); *Mercado v. Rockefeller,* 502 F.2d 666 (2d Cir. 1974). Contra see, *Dillenburg v. Kramer,* 469 F.2d 1222 (9th Cir. 1972).

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Petitioners cannot avail themselves of the clearly erroneous position (Petition pp. 5-10), in direct contradiction to this Court's command in *Hicks, supra*, that summary affirmances and dismissals for want of a substantial federal question are accorded no precedential weight. Petitioners may find solace for their position by submitting the views of those legal commentators who are in disagreement with this Court's decision in *Hicks, supra*. (Petition, p. 9),[9] but will find little support. As this Court clearly expressed when they cited with approval the Second Circuit's opinion in *Doe v. Hodgson, supra:*

> . . . unless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if the Court has branded a question as unsubstantial it remains so except when doctrinal developments indicate otherwise . . . 45 L.Ed. 2d 236.

Therefore, petitioners argue in vain when they attempt to demonstrate that summary affirmances and dismissals for want of a substantial federal question are accorded the same precedential weight as a denial of certiorari (no precedential weight).[10] (Petition, pps. 5-10). This Court has clearly spoken otherwise.[11]

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9. See former Supreme Court Justice Clark's concurring opinion in *Hogge v. Johnson*, ___ F.2d ___ (4th Cir., 1975 decided August 19, 1975).

10. *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912 (1950).

11. *Hicks v. Miranda, supra; Edelman v. Jordan, supra.* See also, *Hogge v. Johnson, supra.*

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CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

Sheldon L. Albert
City Solicitor

Stephen Arinson
Chief Deputy City Solicitor

Raymond Kitty
Deputy in Charge of Litigation

James M. Penny, Jr.
Assistant City Solicitor

By: _____

Louis F. Hinman, III
Assistant City Solicitor

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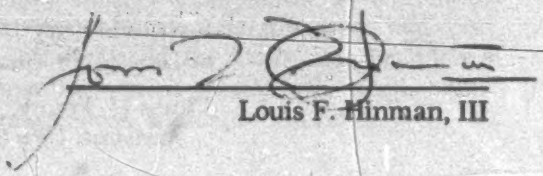
CERTIFICATION

I, LOUIS F. HINMAN, III, Assistant City Solicitor and attorney for respondents in the case of *Colorado Springs Amusements, Ltd., et al. v. Mayor Frank L. Rizzo, et al.*, do hereby certify that copies of respondents' brief in opposition to petition for writ of certiorari were mailed to counsel for petitioners, Michael Battaglini, 702 Land Title Building, Philadelphia, Pennsylvania, 19110, by first class mail, postage prepaid on February 11, 1976.



Louis F. Hinman, III